EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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FOX VARIAN,

Plaintiff,

-against-

KENNETH EINHORN, PhD, CARMEL PSYCHOLOGICAL ASSOCIATES, P.C., SIMON H. CHIN, M.D. and CAREMOUNT MEDICAL, P.C.
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EXPERT AFFIDAVIT

Index No.: 61150/2023

REDACTED Ph.D. [1], a psychologist duly licensed to practice in California and Minnesota, hereby affirms under penalties of perjury pursuant to the laws of New York, which may include fine or imprisonment, that the foregoing is true, and may be used in an action or proceeding in a court of law:

1. I am a psychologist duly licensed to practice in the States of California and Minnesota. I graduated from the Honors Psychology Program with the University of Minnesota in 1973. I then obtained a Masters Degree in Theology at Fuller Theological Seminary. Next I obtained my Doctorate in Clinical Psychology at the Graduate School of Psychology, Fuller Theological Seminary in 1978.

2. My clinical training as a psychologist, including both pre and post-doctoral training, was at several institutions, including the Health Science Center for the University of Minnesota,

[1] The name of this expert witness is redacted in accordance with CPLR § 3101(d)(1), which provides, "In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph." If the Court requires, plaintiff will provide an unredacted affirmation for an *in camera* inspection. *See Marano v. Mercy Hosp.*, 241 A.D.2d 48 (2d Dep't 1998); *see also*, *Cerney v. Williams*, 32 A.D.3d 881 (2d Dep't 2006).

The Veterans Administration Hospital of Long Beach, CA, the Andrus Gerontology Center for the University of Southern California, the LA County Medical Center, the Child Development Clinic in Pasadena, CA and the Children's Health Center in Minneapolis, Minnesota. I also held numerous academic positions, including as a Professor of Clinical Psychology at JFK University. I presently maintain private clinical psychology practice and have done so since 2016. My private practice is focused on providing gender affirming mental health care, especially for trans-youth and their families. Many of my patients are contemplating gender affirming surgery and seek a letter of support to proceed with surgery. Typically, such letters are required for a plastic surgeon to proceed with gender affirming surgery, and I have written numerous letters of support during my career. I am familiar with the standard of care and requirements for a psychologist in providing services to an individual contemplating gender affirming surgery, and the standard of care for assessing a patient for same in connection with providing a letter of support for gender affirming surgery. I am also aware of a psychologist's role in ensuring that the patient (and in the case of a minor, the legal guardian) is fully informed of the likely outcome, effects and risks of a gender reassignment surgery as it relates to their psychological conditions, including in depth discussion of the risk that the surgery may not alleviate their mental health issues, that it may not remedy misgendering by others, and the risk that they may regret the permanent alteration of their body if their gender dysphoria changes. The psychological assessment and discussions that the mental health professional has with an adolescent patient and their legal guardian prior to gender reassignment surgery is essential to the patient being able to make an informed decision in proceeding or forgoing such procedures.

3. This is a medical malpractice action for negligent treatment of the then 16 year old plaintiff and improper performance of gender reassignment surgery, specifically a double mastectomy, when it was not indicated and contrary to the standard of care. It is my understanding that the patient's psychologist, Dr. Einhorn, seeks dismissal of the lack of informed consent against him on the basis that he did not personally perform the surgery. As discussed in detail below, it is my opinion to a reasonable degree of medical certainty that the defendant Dr. Einhorn failed to correctly diagnose and treat the plaintiff in accordance with the applicable standard of care, and failed to engage in necessary discussions with both her and her mother to allow the patient to make an informed decision about the risks, benefits and alternatives to with gender reassignment surgery at age 16.

4. I understand that the only claim defendant Einhorn seeks to dismiss is for lack of informed consent, but discussion of the earlier treatment is relevant for context. The plaintiff/patient Fox Varian was misdiagnosed with body dysphoria and improperly recommended for gender reassignment surgery (a double mastectomy) by Dr. Einhorn. It is my opinion that both defendants were responsible for obtaining ascent from the minor patient, and informed consent from the parent or guardian. Each defendant was responsible for explaining the risks within their area of practice; as for Dr. Einhorn, he was responsible for explaining the psychological risk, benefits and alternatives to gender reassignment surgery, but failed to do so, as discussed in further detail below. Due to the nature of the surgery, which treats a psychological condition as opposed to a physical ailment, Dr. Einhorn was an essential member of the care team and was required to obtain informed consent for the procedure as it related to the patient's psychological conditions.

5. Gender reassignment surgery is intended to treat a patient's psychological diagnoses of gender dysphoria. Thus, the treating psychologist, which in this case was Dr. Einhorn, plays a significant role in ensuring the procedure is indicated and the patient understands the psychological risks associated with proceeding, including a potential risk of regret and failure to alleviate their gender dysphoria. Both the psychologist and the plastic surgeon are responsible for obtaining informed consent, albeit for different risks, though that did not occur in this case. It is my opinion that Dr. Einhorn failed to adequately obtain both the patient's ascent and the parents' consent to the double mastectomy, and the claim for lack of informed consent against Mr. Einhorn should not be dismissed.

6. Each and every opinion provided in this affirmation is stated with a reasonable degree of medical certainty. In reaching the opinions stated herein, I relied upon my review of the pleadings, treatment records, the letter of support by Dr. Einhorn, and the deposition testimony in this case, as well as my education, training and decades of experience as a psychologist. I am familiar with the standard of care for treatment of transgender adolescents both now and at the time of the events.

PERTINENT FACTS

7. Defendant Dr. Kenneth Einhorn began treating the plaintiff/patient Fox Varian in 2017 when she was 14 years of age—but not for gender dysphoria or body dysmorphia. He commenced weekly sessions with Ms. Varian to discuss issues she was experiencing at school and home. The note for their visit on June 23, 2017 indicates a number of challenges Ms. Varian was facing at the time, namely forensic custody issues, CPS involvement, a potentially narcistic father, diagnoses of anxiety, depression and possible autism. Her parents had a history of drug and alcohol issues. Her school performance was poor and she became reclusive. As a result of her issues in

school, she was homeschooled the year prior. She treated with several therapists prior to seeing Dr. Einhorn. She was not suicidal at the time of her initial appointment, and was not described as suicidal in any of her subsequent visits with Dr. Einhorn prior to her surgery. In fact, Dr. Einhorn testified that, although Ms. Varian mentioned suicide from time to time, he never believed that she would actually act upon it and he did not include it in his notes prior to her gender reassignment surgery.

8. During the initial appointment with Dr. Einhorn, he noted that the plaintiff/patient "spent more time judging herself negatively…than anything else". She also displayed disordered and restrictive eating, which was concerning to her mother. She was given coping strategies and advised to speak to a food coach.

9. Ms. Varian continued weekly therapy sessions with Dr. Einhorn over several years, mainly for similar complaints—not gender issues. In 2017, she often fought with her mother due to disordered eating and her schooling. On October 11, 2017, Dr. Einhorn discussed with her mother, Claire Deacon, how adolescents on the autism spectrum behave, and her mother, stated that it "made sense." Thus Dr. Einhorn was aware of her potential autistic tendencies as early as 2017.

10. In the later months of 2017, she continued to struggle with transitions at school and anxiety. She began acting lessons and participating in theater, which seemed to be a good outlet though it caused stress at times.

11. As of July 12, 2018, Ms. Varian had been diagnosed with autism spectrum disorder. This was a significant diagnosis as children with autism spectrum disorder can experience social challenges and find gender identity confusing as a result.

12. In January 2018, the plaintiff Ms. Varian began isolating more. She continued to display a lot of anxiety around school, and it led to many conflicts with her mother and teachers. As of May 2018, it was determined that she would not be attending public high school, and they were looking into alternative schooling options for Ms. Varian.

13. During a November 24, 2018 visit with Dr. Einhorn, Ms. Varian stated that she wished to change her name from Bella to Gabe, but her mother was opposed to same. Prior to this, there were no documented discussions regarding gender confusion or symptoms of possible gender dysphoria.

14. On December 22, 2018, Ms. Varian discussed her sexuality with Dr. Einhorn. She wanted a binder (i.e. a device that gives the appearance of a flat chest) and a male haircut, but she was still using female pronouns. Her mother was not fully accepting, but was recommended to support "Gabe" as she explored her sexuality. The plan included ordering a binder and for mom to agree on a male hairstyle.

15. A visit on December 29, 2018 noted that she had gotten a male haircut, though was still "very ambiguous". There was no discussion of the binder. She continued to see Dr. Einhorn weekly for treatment of her anxiety and depression.

16. In January 2019, she began using different pronouns, requesting to be "he" or "they". At that point, Ms. Varian was not ready to tell her mother about these changes, and reported struggling with an old friend not knowing about these changes. It thus appears that she was struggling to present as a male to her friends and family.

17. In February of 2019, Ms. Varian changed her name again to "Rowan" and confirmed use of the pronoun "he". Ms. Varian also asked unspecified "others" to recognize her

new pronoun, though there are no details regarding who or where these new pronouns were being used or made known, and her school attendance was problematic. A note from February 23, 2019 states "Rowan's desire to avoid attention goes against exactly what happens when you transition and he has to embrace it and use a non-emotive line to correct people as needed."

18. In March 2019, Ms. Varian continued to discuss transitioning to male, and techniques to stop responding to her birth name with Dr. Einhorn.

19. On March 16, 2019, Ms. Varian discussed "top surgery" (i.e. a double mastectomy to remove one's breasts for purposes of gender reassignment) during her session with Dr. Einhorn. The plan was for her to learn the necessary steps to become a candidate for such surgery. Presumably, this refers to the Standards of Care for the Health of Transsexual, Transgender and Gender Non-Conforming People as established by the World Professional Association for Transgender Health (known as "WPATH"). Per the standards of care in effect at that time, as dictated by WPATH, prior to an adolescent becoming a candidate for gender reassignment surgery, the patient should undergo fully reversible interventions (i.e. use of GnRH analogs to suppress puberty) and partially reversible interventions (such as hormone therapy). Additionally, before being recommended for surgery, the adolescent patient should also be living publicly as the desired gender for an extensive period of time, usually a year or more. Despite these standards, there was no discussion of GnRH documented in the records and Ms. Varian reportedly refused hormone therapy. She also struggled to identify publicly as male.

20. Toward the middle of March 2019, Ms. Varian became angry with her mother for not obtaining more information regarding top surgery. She was feeling "disrespected" at school and was "angry" over her appearance in the mirror. Going forward, it appears the focus of her sessions with Dr. Einhorn were obtaining gender reaffirming surgery.

21. Ms. Varian continued to see Dr. Einhorn weekly. As of April 13, 2019, it was noted money and family dynamics were "barriers to name change and top surgery". Importantly, Dr. Einhorn stated that he believed some of her feelings and behaviors were related to "spectrum issues and not obsession over body dysphoria", but indicated they were going to do "everything they can" to change her name. Given this reference to "spectrum issues", Dr. Einhorn should have encouraged Ms. Varian to step back and slow down her decision to seek surgery, but instead, in the coming months, Dr. Einhorn accelerated it by referring her to a surgeon with a shorter wait list and persistently urging her mother to consent to the procedure.

22. In April 2019, challenges with eating, school and self-accountability remained. At that time, Ms. Varian was identifying as a male named "Rowan". Dr. Einhorn believed "Rowan convinces himself that [everything is] everyone else's fault and then gets angry when he is left holding the bag that is, in fact, his."

23. Ms. Varian continued to make slow progress at school in April 2019, though she came out as male to her karate instructor, which was seen as a significant step. In May, Ms. Varian reported feeling "stuck", and Dr. Einhorn questioned "where things would be if Rowan's name was changed and he had information about transgender medical support. If not stagnant about that, would he be progressing in other areas too?" Dr. Einhorn urged Ms. Varian to select a middle name in the event a name change became possible.

24. In May 2019, Ms. Varian continued to express anger that her mother was not supportive. As of May 25, 2019, Dr. Einhorn discussed "current research on transgender transitions" with Ms. Varian's mother. According to Claire Deacon, Dr. Einhorn imparted on her the considerable risk of suicide given her daughter's pre-existing depression. Dr. Einhorn noted

"other mental health issues are hard to untie from body dysmorphia." He encouraged the family to speak with the pride center.

25. Through June and July, Ms. Deacon/mom continued to be against surgical intervention. As of July 20, 2019, Ms. Varian had active diagnoses of anxiety and body dysmorphia. Ms. Varian was unable to regulate her emotions, and the plan was to continue on emotional regulation skills. On July 27, 2019, Dr. Einhorn noted that mom was still against surgery, and suggested "learning to calm might help create an argument for her to have the surgery sooner".

26. In August 2019, Dr. Einhorn continues to misdiagnose Ms. Varian with body-dysmorphia. Her mother continued to be against the surgery, and they were considering home schooling again, which was significant as it would not require Ms. Varian to live publicly as male, which is a pre-requisite to obtaining gender reaffirming surgery per the WPATH guidelines. At this point, Dr. Einhorn's plan turned to "educating Mom about eating and body dysmorphia".

27. As of September 2019, Ms. Varian opted out of public high school and was again homeschooled. Per Dr. Einhorn, "Decision not to go to school a mixed bag—if top surgery was done, likely would have chosen to go—the way he looks is driving much of his anxiety per his own report (quick to tears about it in session)."

28. On September 14, 2019, Dr. Einhorn encouraged Ms. Varian to self-advocate in easing mom's "worry about top surgery." Another note from September 21, 2019 states that "Rowan will find himself more supported by Mom when he shows by his actions ownership of his gender [--] finding a provider who does top surgery would do this."

29. Ms. Varian continued to research surgeons, but many had long wait lists. Dr. Einhorn therefore recommended that Ms. Varian see Dr. Simon Chin, another defendant in this

case. Thus, instead of slowing down the process, which was advisable for this emotionally unstable patient with autism, Dr. Einhorn escalated potential surgical intervention.

30. Ms. Varian's visits with Dr. Einhorn in October 2019 focused on getting ready for consultation and surgery with Dr. Chin. Per the records, both parents were not in favor of the name change or surgery.

31. Despite this, on October 14, 2019, Dr. Einhorn provided a letter of support for top surgery with Dr. Chin. Notably absent from the letter is any discussion of the parents' opinion or discussion with them about the procedure. In the letter, he again notes a diagnosis of autism spectrum disorder and that he has diagnosed her with social phobia and body dysmorphic disorder. There is no diagnosis of gender dysphoria in the letter. She did not attempt hormone therapy prior to issuance of this letter of support. She did not use GnRH analogues. She was not required to live publicly as desired gender for an entire year. Therefore, Dr. Einhorn's issuance of this letter of support was a departure from the standard of care for psychologists treating an adolescent patient with suspected gender dysphoria.

32. Plaintiff's mother testified that she was not in agreement with gender reassignment surgery. However, in reviewing page 65 of her deposition testimony, she ultimately agreed to the surgery after Dr. Einhorn informed her that Ms. Varian would commit suicide if she did not have the surgery.

33. As of November 2019, the focus of the discussions with Dr. Einhorn turned to her upcoming surgery with Dr. Chin. Initially surgery was scheduled for December 12, 2019, but was pushed back to December 19, 2019 which angered the plaintiff. On December 14, 2019, Ms. Varian expressed anxiety around the surgery, which is another indication that it was prematurely offered.

Dr. Einhorn noted "… Rowan struggles with the humanity of others while demanding tolerance for himself". The plan was to reconnect after the holidays and post-operatively with focus on emotional regulation.

34. Surgery was performed by Dr. Simon Chin at Northern Westchester Hospital on December 16, 2019, a mere 1 year after she first expressed to Dr. Einhorn that she might want to transition to a male gender identity. Plaintiff's mother executed the written consent for surgery as the plaintiff was still a minor at the time. The preoperative diagnosis was gender reassignment. The procedure performed was a bilateral shot scar breast reduction for gender reassignment. Per the operative report, Dr. Chin advised the patient of the "risks and benefits of the procedure", though there was no indication that Dr. Einhorn discussed with the patient and her mother the effect of surgery on her psychological condition (i.e. that it may not resolve her gender dysphoria), or her potential for future regret.

35. Following the procedure, Ms. Varian had excess skin which necessitated a second surgery. The second surgery was performed by non-party surgeon Dr. Laurel Chandler in January 2021. Subsequently, Ms. Varian lived as a male for a few years before she began to experience remorse. As she approached 19 years of age, she underwent a detransition back to female. She now reassumed a female identity.

OPINIONS

36. It is my opinion to a reasonable degree of medical certainty that the defendants in this case, and in particular the defendant psychologist Dr. Einhorn, improperly diagnosed and treated the plaintiff Fox Varian, resulting in performance of an unnecessary and wholly inappropriate gender reassignment surgery, irreversible physical harm (removal of both breasts)

and significant psychological harm. It is also my opinion that, as the patient's psychologist, Dr. Einhorn had a duty to obtain ascent from the minor patient and informed consent from the patient's legal guardian after discussing at length the the risks, benefits and alternatives to gender reassignment surgery. When an adolescent patient is contemplating gender reassignment surgery, it is the obligation of the psychologist to impart the psychological risks associated with it, including but not limited to the risk that the surgery may not alleviate the patient's feelings of gender dysphoria, that the patient may continue to be misgendered, and that the patient may experience remorse if their feelings about their gender change following permanent alteration of their anatomy.

37. At the outset, it is important to understand the distinction between body dysmorphia and gender dysphoria, which are two entirely different diagnoses with different treatment methods. Body dysmorphia is a mental health condition where a patient will obsess over a minor or non-existent flaw in their physical appearance. It need not be gender related at all. Treatment of this condition is psychotherapy, not surgery.

38. On the other hand, gender dysphoria is psychological distress a person experiences due to feelings that their gender does not comport with the sex they were assigned at birth. Treatment plans are highly individualized and depend on the patient, but can range from psychotherapy, use of devices such as binders, medical therapies such as hormone therapy, or gender reassignment surgery. Treatment that helps one patient with gender dysphoria can look very different from the treatment plan that helps another patient with this condition, and the treatments generally fall into three categories: fully reversible, partially reversible and irreversible. Fully reversible treatment can include use of GnRH analogues to suppress estrogen or testosterone production in an effort to delay puberty. Partially reversible interventions include hormone therapy

to masculinize or feminize the body. Irreversible interventions are surgical in nature. The standard of care generally requires that a patient begin with reversible treatment, progress to partially reversible treatment and then permanent interventions only if needed.

39. It is my opinion that Dr. Einhorn incorrectly diagnosed Ms. Varian with body dysmorphia when her symptoms were suggestive of gender dysphoria, which manifested as her desire to transition to the opposite sex. Still, she should not have been referred for surgery.

40. Even if we assume that Dr. Einhorn's diagnosis of body dysmorphia was correct, then the patient should never have been referred for gender reassignment surgery at all. Dr. Einhorn should have explained to the patient and her mother that the standard of care for treatment of body dysmorphia does not include surgical intervention; rather, the treatment for body dysmorphia is psychotherapy. Dr. Einhorn also should have known and explained that gender reassignment surgery would not remedy body dysmorphia and was not a viable treatment option at all for this patient.

41. Dr. Einhorn suggests that diagnoses of body dysmorphia and gender dysphoria are interchangeable, but they are not. He claims that he utilized a diagnosis of body dysmorphia for "billing" purposes, but this is semantics as there is no mention of a proper diagnosis of gender dysphoria in any of his treatment records for this patient.

42. Even if these diagnoses were interchangeable (they are not), and Dr. Einhorn had made the proper diagnosis of gender dysphoria, Dr. Einhorn had an obligation to inform the patient and her legal guardian that the standard of care for treatment of gender dysphoria in an adolescent required commencement of reversible interventions (GnRH analogs) and partially reversible interventions (hormone therapy) before surgery became a viable option. There is no reference in the records to any discussion about GnRH analogs, and only vague reference to hormones with

quick dismissal of them because the patient did not want to try them (which was yet another red flag).

43. Dr. Einhorn also should have informed the patient and her mother of the risks, benefits and alternatives to gender reassignment surgery, especially given her autism diagnosis and young age. It was Dr. Einhorn's responsibility as the psychologist to inform the patient and her legal guardian that such surgery may not remedy her emotional distress related to her gender, that she may continue to experience misgendering, and that there was a significant chance that surgery would adversely affect her mental health if her gender dysphoria did not continue into adulthood, leading her to regret permanent alteration of her body. Dr. Einhorn's treatment records do not reflect such conversations with the patient or her mother, and he neglected to obtain informed consent prior to providing his support for the gender reassignment surgery.

44. Plaintiff's mother also testified she agreed to this surgery because Dr. Einhorn told her that if she did not consent to her daughter undergoing top surgery, that her daughter would kill herself. Dr. Einhorn essentially gave the plaintiff's mother two choices: death or top surgery. This is unacceptable and a departure from the standard of care, especially since Dr. Einhorn testified that he never believed Ms. Varian to be a suicide risk. None of his treatment records for visits prior to the surgery indicate she is suicidal. Dr. Einhorn's statements to the plaintiff's mother, seemingly made to inappropriately persuade her to consent to surgery, were a departure from the standard of care, unethical and indefensible under the circumstances. Dr. Einhorn coerced Ms. Deacon (Ms. Varian's mother) to execute the consent forms for fear she would lose her daughter to suicide if she withheld consent. In doing this, Dr. Einhorn clearly inserted himself into the consent process for this procedure.

45. I disagree with the suggestion by Dr. Einhorn's counsel that Dr. Einhorn had no responsibility to obtain informed consent for this procedure because he did not physically perform the surgery. Obtaining informed consent for gender reassignment surgery is a team effort between both the surgeon and the mental health professional. The mental health professional cannot determine if the patient is medically suited for the surgery, and the surgeon cannot determine if the patient is psychologically qualified for the surgery. Thus the two specialties must consult with one another to form a treatment plan, and each must obtain informed consent to treatment in their respective areas of practice. One cannot serve as a substitute or defer to the other.

46. Based upon my review of the testimony, records and letter of support, Dr. Einhorn failed to provide the patient and her mother with the alternatives to surgical intervention (GnRH analogues to suppress pubic changes or hormone therapy), failed to inform them of the foreseeable risks of Ms. Varian's gender dysphoria resolving without surgery, failed to inform them of the likelihood that her gender dysphoria may not continue into adulthood, and failed to inform them of the high likelihood of regret given her other mental health conditions, all of which should have been disclosed. Dr. Einhorn was responsible for obtaining informed consent from the patient's guardian, and ascent from the adolescent patient, but failed to provide them with the information necessary in this case.

47. It is my opinion that Dr. Einhorn departed from the standard of care at numerous

stages of Ms. Farian's treatment. He also neglected to obtained ascent from the patient and informed consent from the patient's mother, as he failed to explain the risks, benefits and alternatives to gender reassignment surgery despite the patient's young age and autism diagnosis. It is thus my opinion that the claim for lack of informed consent against him should not be dismissed.

Dated: January 20, ~~2024~~ 2025

REDACTED

REDACTED

Sworn to before me on the 20th day of January ~~2024~~ 2025

MFC

Michelle Renee Ford

Notary Public

MICHELLE RENEE FORD
Notary Public
Minnesota
My Commission Expires Jan. 31, 2029

State of MN
County of Dakota

Commission Expires
20 January 2029

WORD COUNT CERTIFICATION

Pursuant to 22 NYCRR 202.8-b, I certify that the accompanying Expert Affidavit contains 4,670 words, excluding the caption and signatures. This certificate was prepared in reliance on the word-count function of Microsoft Word, the word-processing system used to prepare this document.

Dated: White Plains, New York
January 22, 2025

Nicole Varisco
_____
NICOLE M. VARISCO, ESQ.